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Shifting Legal Positions Behind High Court Abortion Punt

By **Mark Payne**

Law360 (June 28, 2024, 8:50 PM EDT) -- Rapid developments in Idaho abortion law paved the way for a fractured U.S. Supreme Court decision that leaves doctors in the state in murky legal waters around providing abortions to patients in medical crisis.

In a per curiam decision on Thursday, justices described shifting positions on both sides of the dispute over federal preemption in the months since the court granted an emergency application to hear the fraught case.

Six concurring justices, including the staunchly anti-abortion Justice Amy Coney Barrett, pointed to an amendment to Idaho's abortion statute and shifts in Biden administration positions to conclude the case shouldn't have been granted review at all.

Reflecting the evolving nature of abortion law, justices wrote a collection of concurring and dissenting opinions that reached sharply different conclusions about whether the court should have ruled on the merits of the case, and why.

"The multiple opinions of the justices reflect the difficulty of applying legal principles to emergency medical decision-making," said Michelle Williams, senior counsel at Baker Donelson Bearman Caldwell & Berkowitz PC.

Thursday's decision will allow abortions to continue in Idaho in life-threatening situations under a federal law requiring doctors at Medicare-funded hospitals to provide emergency care, despite a strict "no exception" state ban.

But rather than decide whether the Emergency Medical Treatment and Active Labor Act, or EMTALA, preempts the Idaho abortion ban, the court said it took up the case too soon and dismissed it.

Changes in Tune

In January 2023, Idaho's high court upheld the constitutionality of Idaho's three abortion laws, including the strict Defense of Life Act at issue in the Thursday decision.

In that case, the court said that treating an ectopic pregnancy, in which an embryo implants before it reaches the uterus, doesn't count as an abortion under the statute, and that doctors can rely on "good faith" judgment to decide to save a patient's life, according to Idaho court briefing. Idaho's law "does not require objective certainty, or a particular level of immediacy, before the abortion can be 'necessary' to save the woman's life."

In July 2023, before the U.S. Supreme Court granted review, the Idaho legislature amended the statute to codify the state Supreme Court's clarification on ectopic pregnancies and "recharacterize the act's life-saving language as an exception to the act's abortion prohibition rather than an affirmative defense," the state said in briefing.

Justice Barrett's concurrence, joined by Chief Justice John Roberts and Justice Brett Kavanaugh, said that after the case came before the justices, the federal government narrowed its argument regarding mental health and conscience exemptions for doctors, weakening the idea that Idaho would suffer harm under an injunction.

At **oral arguments** in April, Joshua Turner of the Idaho Office of the Attorney General argued that a decision that EMTALA preempted the Idaho ban could lead to patients using a mental health issue to sidestep the prohibition. U.S. Solicitor General Elizabeth Prelogar pushed back, stating flatly that because abortion is not used as a stabilizing treatment for a mental health crisis, EMTALA was not implicated.

Justice Barrett called that an "important concession" in which the government agreed federal law "does not gut" the state ban. Further, the federal government said in arguments that EMTALA doesn't override federal **conscience objections** for doctors under such laws as the Church Amendments and the Affordable Care Act.

"It alleviates Idaho's concern that the government's interpretation of EMTALA would strip healthcare providers of conscience protections," Justice Barrett wrote.

Sharp Divisions on Legal Changes and Court Review

Justice Barrett also wrote that since the district court took up the case in 2022, the Idaho law has "significantly changed." Oral arguments also clarified issues in the case and brought forward new questions to consider, she said.

In these circumstances, the court's grant of certiorari was a "miscalculation" because both sides have a "still evolving" view of the case, she wrote.

"The United States has clarified that EMTALA's reach is far more modest than it appeared when we granted certiorari and a stay," Justice Barrett wrote. "Idaho law has materially changed since the district court entered the preliminary injunction, and, based on the parties' arguments before us, it seems that the framing of these cases has not had sufficient opportunity to catch up."

In sharp contrast, a dissent by Justice Samuel Alito said nothing legally relevant had occurred since January, and lambasted the court for not deciding a dispute he described as clear, urgent and ripe. He also took sharp issue with the court's decision to take the "extraordinary step" to grant the application and then not address the dispute itself, calling it "baffling."

"Apparently, the court has simply lost the will to decide the easy but emotional and highly politicized question that the case presents," wrote Justice Alito, joined by Justice Clarence Thomas and in part by Justice Neil Gorsuch. "That is regrettable."

Justice Ketanji Brown Jackson concurred with the court's result but wrote that the conclusion that the case was improvidently granted simply allowed the court "to avoid issues that it does not wish to decide."

She wrote that although Idaho's lawyers have "changed their tune" about the types of medical care that fall in the gray area between state and federal law, the legal issues are the same.

"Having now been sued over its interference with EMTALA's protections for people experiencing these conditions, Idaho has shifted its position, both here and before the district court, recharacterizing abortions in these scenarios as life-saving care permitted under Idaho law," Justice Jackson wrote, calling the change a "convenient rhetorical maneuver."

Doctors in Idaho still have to navigate whether a presenting patient with a medical condition might face or might not face death.

"Such a doctor, observing the different legal thresholds for action under state and federal law — not to mention the severe criminal penalties for a miscalculation — would surely be cowed into not providing abortion care that medical standards warrant and federal law requires," Justice Jackson wrote.

Following the opinion, Idaho Attorney General Raúl Labrador said the concessions made by the federal government keep the state's law mostly intact. He cited Justice Barrett's conclusion that the injunction is unlikely to prevent the state from enforcing its law.

"The Supreme Court sent the case back to the 9th Circuit today after my office won significant concessions from the United States that Justice Barrett described as 'important' and 'critical,'" Labrador said.

A Decision With Little Clarity

Sara Rosenbaum, a health law professor and the founding chair of the Department of Health Policy at George Washington University's Milken Institute School of Public Health, noted that, post-certiorari, Idaho introduced arguments about what kinds of abortions would be permitted under the law.

Furthermore, the Biden administration narrowed its argument regarding mental health and conscience exemptions for doctors that undermined the idea that Idaho would suffer harm under the temporary injunction.

"The U.S. appeared to make some concessions and Idaho made some concessions, leaving the factual record uncertain, so [Justice Barrett] saw ambiguities in both factual and legal rhetoric," Rosenbaum said.

The government identified PPRM — placental abruption, pre-eclampsia, and eclampsia — as types of emergency abortions that should be available under the law. During briefing, Idaho conceded that these types of abortion are available under the law.

University of Houston Law Center constitutional law professor Emily Berman said that the nature of the decision suggests that the justices thought there would be more agreement among themselves when they decided to take the case.

"Maybe it was only after they heard the case and voted on it and started writing opinions, they realized that they actually couldn't all generate a majority opinion," Berman said.

In this situation, members of the court felt it was better to punt the issue than issue a "very splintered decision," she said.

Typically, when courts dismiss a case as improvidently granted, it's over a jurisdiction issue and whether a case is the proper vehicle to address a merits question. But in those instances, the justices usually decide that quickly after conferencing.

"This felt to me more like, 'This is really messy and we can't agree and we've decided we don't want to actually decide the case,'" said Berman, who argued that the legal positions of the parties may not have moved "as much as those three concurring justices would like to make it out to be."

"I think arguing that the facts or the arguments have shifted provides a good excuse to dismiss the case," she said.

E. Bahati Mutisya, a healthcare attorney at Baker Donelson, said confusion about what is allowed under the law is changing how doctors are treating patients in emergency rooms.

"Women are being discriminated against, in other words treated differently, in one state or another based on their reproductive status and geography," Mutisya said. "Preventing this type of discrimination is the basis for EMTALA."

George Washington University's Rosenbaum said that it just isn't an issue of protections for women, or just an Idaho issue.

"What the states have done has thrown all of this into uncertainty across the country — certainly Idaho isn't alone," Rosenbaum said. "As a result, the cloud of uncertainty hangs over everybody still."

--Editing by Brian Baresch and Michael Watanabe.